U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: FEB 25 2003

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

IN BEHALF OF PETITIONER: [redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Elizabeth Heyward

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that she had established a new commercial enterprise, invested the requisite amount, and created the required jobs.

On appeal, counsel asserts that the petitioner increased the net worth of a preexisting business by at least 40 percent and personally guarantied the debt of the business. The petitioner submitted financial statements, the corporation's 1999 tax return, and a personal guaranty signed by the petitioner and her husband. While counsel asserted that he would submit a brief within 30 days, as of this date, more than 21 months later, we have received nothing further.

The 21st Century Department of Justice Appropriations Authorization Act, Pub L. No. 107-273 116 Stat 1758, which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petitioner's appeal was pending on November 2, 2002, she need not demonstrate that she personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, Lih Lih International Investment, Inc., not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000.

[redacted]

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
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> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
>
> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
> >
> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
> >
> > (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
> >
> > (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting

or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

On the Form I-526, the petitioner indicated that she invested $1,050,000 on May 1, 1999. In his initial brief, counsel asserted that Lih Lih International Investment subsequently purchased Diho Market for $1,000,000. The petitioner submitted a stock certificate for 1 million shares at $1 par value and the minutes of the corporation's organizational meeting at which time the company resolved to issue the petitioner 1,000,000 shares for a "cash contribution." The petitioner also submitted a sale and purchase agreement whereby the petitioner agreed to purchase a grocery store from Houston Diho Market, Inc. The sale price is listed as $1,000,000, $600,000 for goodwill, inventory and equipment and $400,000 "for" the assumption of accounts payable. The payment terms in the contract and reiterated in the settlement statement obligated the petitioner to pay $200,000 in earnest money and $400,000 at closing, for a total of $600,000. The petitioner further submitted cancelled checks issued by Lih Lih International Investment on a MetroBank account, number 7036183, to Houston Diho Market. Check 1004 is dated May 11, 1999 and is for $200,000, Check 1005 is dated May 14, 1999 and is for $300,000, and check 1006 is dated May 25, 1999 and is for $100,000. The petitioner submitted a balance sheet as of December 31, 1999 and the corporation's 1999 tax returns. Both documents reflect total capitalization of $611,500 and $15,700 in shareholder loans.

As evidence that the money used to purchase the store derived from the petitioner, the petitioner submitted foreign exchange memos reflecting that the petitioner's spouse transferred the following amounts to Lih Lih International Investment: $300,000 on May 6, 1999, $200,000 on May 25, 1999, $300,000 on June 5, 1999, and $200,000 on June 23, 1999. The foreign exchange memos, however, while identifying Lih Lih International Investment as the recipient, fail to identify the bank or account number to which the funds were transferred. In fact, the memo references Bank of New York, Citibank, and Union Bank of California as the "Corr. Bank."

On September 18, 2000, the director requested additional documentation. Specifically, the director noted that the corporation, not the petitioner, appeared to have assumed the $400,000 in liabilities and requested bank statements reflecting the withdrawals out of the petitioner's accounts and deposits into Lih Lih International Investment's account.

In response, counsel asserted that the petitioner personally guarantied the loans and that no personal guaranties were involved in the court cases holding that a corporation is a separate legal entity. Counsel further asserted that the petitioner had used the remaining funds to expand the business' inventory and payroll and to maintain a reserve. Counsel also asserted that the petitioner intended to expand the business to include the sale of cooked food.

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As evidence that the full $1,000,000 was invested and at risk, the petitioner submitted the company's balance sheets as of May 31, 1999 (right after the purchase), July 31, 1999 and June 30, 2000. These balance sheets reflect liabilities beginning at $515,757, decreasing to $472,093 as of July 31, 1999 and increasing to $591,872 as of June 30, 2000. The stock increased from $511,500 as of May 31, 1999 to $611,500 as of July 31, 1999 and remained at that amount. Loans from shareholders were zero in May 1999, increased to $71,000 as of July 31, 1999 and increased to $145,700 as of June 30, 2000.

As evidence to trace the funds, the petitioner submitted her spouse's passbook statement at Union Bank of Taiwan reflecting withdrawals $300,000 on May 6, 1999, $200,000 on May 28, 1999, $300,000 on June 5, 1999, and $200,000 on June 23, 1999. In addition, the petitioner submitted MetroBank statements for account 7036183. These statements reflect deposits of $299,978 on May 6, 1999, $199,980 on May 25, 1999, $299,985 on June 7, 1999, and $199,985 on June 23, 1999. The statements also reflect that check 1004 was cashed on May 17, 1999, and check 1005 was cashed on May 26, 1999. It appears that check 1006 was cashed on June 10, 1999, although that check is not numbered on the statement. These statements, which cover May 1999 through December 2000, do not reflect normal business activity. The statements include few and sometimes no transactions.

The director concluded that the petitioner had still failed to provide evidence of the corporate loan, his guaranty of that loan, or that the lender was precluded from proceeding against the business itself. The director further questioned the source of the $200,000 reserve, concluding that the money could be either proceeds or the shareholder loan reflected on the balance sheets. The director further determined that the record still did not adequately trace the path of the funds from the petitioner to the new commercial enterprise and that any funds transferred could have included the shareholder loan. Finally, in response to counsel's assertion that the petitioner was at least "in the process" of investing the full amount, the director concluded that the petitioner had not demonstrated that the remaining funds were fully committed.

On appeal, the petitioner submitted a balance sheet for the corporation as of December 31, 2000 reflecting liabilities of $746,361.75, common stock of $611,500, and shareholder loans of $110,700. The petitioner also submitted two guaranties dated October 21, 2000 whereby the petitioner and her husband personally guarantied "all debts" of Lih Lih International Investment. The lender is identified as Texas First National Bank. Both guaranties are unsecured. The petitioner did not provide the documentation of the underlying loan.

The purchase of a business is a legitimate capital expense. As such, the $600,000 paid to Houston Diho Market, Inc. can be considered part of the petitioner's investment. At issue is the remaining $450,000 that the petitioner claimed on the petition to have already invested as of May 1, 1999. Initially, the petitioner claimed to have "invested" the remaining $400,000 by having assumed the $400,000 in liabilities from Houston Diho Market, Inc. As the director rightly concluded, however, the corporation, and not the petitioner, assumed those liabilities. According to the balance sheet as of May 31, 1999, at the time of sale, Lih Lih International Investment, Inc. had $515,757 in liabilities, $145,000 of which was a short-term bank credit line and

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$55,785.88 of which was a bank equipment loan. The only liability that appears on Houston Diho Market, Inc.'s May 31, 1999 balance sheet that does not appear on Lih Lih International Investment's May 31, 1999 balance sheet is $50,000 owed to shareholders. Instead, Lih Lih International Investment's balance sheet reflects that the corporation still owed $100,000 to Houston Diho Market, Inc. That account payable had disappeared as of the July 31, 1999 balance sheet.

Capital used to satisfy a large outstanding mortgage or other long-term liability is a legitimate investment. Had the petitioner purchased a business for $600,000 and satisfied a $400,000 mortgage, the petitioner's investment would have been sufficient. The record reflects no such loan repayment. Other than the payment of the money owed to Houston Diho Market, the balance sheets do not reflect that the petitioner satisfied any significant outstanding liabilities. In fact, most of the liabilities include accounts payable and other current liabilities, which are normally paid from proceeds and are normal operating expenses. As stated by the director, the court in *De Jong v. INS*, Case No. 6:94 CV 850 (E.D. Texas January 17, 1997), concluded that the reinvestment of proceeds cannot be considered capital.

Next we will consider counsel's argument that the petitioner's guaranty of the corporation's loans constitutes an investment. As noted by the director in his request for additional documentation and his final decision, a corporation is a separate and distinct legal entity from its owners or stockholders. The director cited *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). In response to the director's request for additional documentation, counsel argues that these cases did not deal with a shareholder's personal guaranty of a corporation's debts. In his final decision, the director countered this argument with language from *Matter of Soffici*, 22 I&N Dec. 158 (Comm. 1998). On appeal, the petitioner has now submitted evidence that she and her husband personally guarantied Lih Lih International Investment's debt with Texas National Bank.

First, without the underlying loan documentation, we are unable to determine how much debt the guaranty is securing. The guaranty was signed October 21, 2000 (after the date of filing the petition). The July 31, 1999 balance sheet, the balance sheet prepared most recently before the guaranty was signed, reflects a bank credit line of $129,000 and a bank equipment loan of $51,597. These amounts increased to $233,200 (credit line) and $42,362 (equipment loan) by December 31, 1999. Thus, the petitioner did not guaranty $400,000 in debt.

Second, the definition of capital at 8 C.F.R. § 204.6(e) requires that all indebtedness be secured by the assets of the petitioner. As stated above, the guaranties submitted on appeal are unsecured.

Finally, as quoted above, the definition of capital at 8 C.F.R. § 204.6(e) specifically states that the assets of the new commercial enterprise cannot secure any of the indebtedness claimed as capital. As quoted by the director, *Matter of Soffici* provides that where the petitioner's guaranty does not prohibit the lender from proceeding against the new commercial enterprise, "the petitioner's personal guarantee of payment does not change the character of the mortgage." The

guaranties submitted do not reflect that Texas National Bank is precluded from proceeding against Lih Lih International Investment. As long as the assets of the new commercial enterprise secure the bank loans, whether or not the petitioner's personal guaranty allows the bank to proceed against the petitioner should Lih Lih International Investment declare bankruptcy, is irrelevant. Thus, regardless of the amount guarantied or whether it is secured by the petitioner's assets in addition to the assets of the corporation, any corporate debt covered by the petitioner's guaranty cannot be considered part of her qualifying investment.

Regarding the path of the petitioner's investment, we agree with the director that the evidence is not clear. As stated above, the foreign exchange memos do not reference the receiving bank or account number, although the consistency between the passbook statements, foreign exchange memos, and MetroBank statements strongly suggest that the money was transferred to the corporate account at MetroBank. The record adequately reflects that the money in the MetroBank account was used to purchase the store. As stated above, however, this account does not reflect normal business activity, most statements showing only one or two transactions, if any. Between May 1999 and January 2001, the account reflects deposits totaling approximately $1,260,399, $1,000,000 of which is traceable back to the petitioner. As of January 31, 2001, the account had a balance of only $234,194. The statements reflect that $600,000 went towards the purchase of the store and that an additional $25,500 was paid to the business. The statements, however, also reflect large debits with no evidence that they represent legitimate business expenses. For example, a check for $150,000 on June 11, 1999, a check for $70,000 on August 13, 1999, a wire transfer of $100,010 on August 17, 1999 and other checks in the low five digits cleared the account. Without evidence of how these funds were used, we cannot determine that the money transferred to the account was all placed at risk for employment creation purposes. In addition, as stated by the director, some of the money that is traceable to the petitioner may constitute the shareholder loans reflected on the balance sheets and tax returns. The director correctly noted that money loaned to the corporation is not a qualifying investment.

We note that at no time have the balance sheets or tax returns ever reflected more than $611,500 in stock and additional paid-in-capital. Thus, the remaining $388,500 allegedly invested is not accounted for as equity on the balance sheets.

Regarding the petitioner's future plans to expand the store, the record includes no evidence that the petitioner is committed to those plans. It is acknowledged that, unlike the petitioner in *Matter of Ho*, 22 I&N Dec. 206 (Comm. 1998), this petitioner has an operating business. Regardless, the case stands for the proposition that all the funds must be at risk. *Matter of Ho* provides:

> Simply formulating an idea for future business activity, without taking meaningful concrete action, is similarly insufficient for a petitioner to meet the at-risk requirement.

Id. at 210. The record contains no evidence that, as of the date of filing, the petitioner had entered any contracts to add cooked food services to the store or to buy a poultry farm.

For all of the reasons discussed above, the petitioner has not demonstrated a qualifying investment above the $600,000 used to purchase the store.

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(e) states, in pertinent part:

> *Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.
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> * * *
>
> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117, 19 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered

comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho, supra*. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id. at 213.

On the petition, the petitioner indicated that the business employed no employees at the time of her investment, 33 at the time of filing and that two to five more positions would be created. The petitioner submitted a list of employees. In his request for additional documentation, the director requested evidence of the number of jobs currently and prior to the sale of the store as well as the Forms I-9 for the employees.

In response, counsel argued that the petitioner saved 30 jobs and would expand the store to create another 12. Counsel asserted that, pursuant to *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), the petitioner need not create any new jobs because she increased the net worth of the store by more than 40 percent. The petitioner submitted quarterly wage and withholding reports for the second quarter of 2000 reflecting between 29 and 30 employees. The document reflects that only 24 of the employees could have worked full-time for at least minimum wage, although we acknowledge that the list includes more than 30 names, indicating that there was turnover during this quarter. The petitioner also submitted a personal statement asserting that she was negotiating to purchase a poultry farm and intended to expand the services of the store to include cooked food.

The director noted that increasing the net worth of a business was, at the time, relevant only to whether or not the petitioner had personally established a new commercial enterprise. The director concluded that the record did not establish the creation of 10 new jobs and that the

petitioner's intention to expand the store and create additional jobs, while sincere, did not meet the requirements for a comprehensive business plan. Finally, the director noted that the petitioner had failed to submit the Forms I-9 as requested. The petitioner does not address this issue on appeal.

We concur with the director that the petitioner must demonstrate that she has created 10 new jobs or submit a comprehensive business plan demonstrating that it is reasonable to conclude that the business will create 10 jobs within two years. Counsel's assertion that the petitioner need only demonstrate that she saved 30 jobs because she increased the net worth of the business by at least 40 percent is legally wrong. First, counsel cites *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998) for this assertion, but provides no page citation to this thirty page decision that deals mostly with investment issues. That case only discusses employment insofar as to conclude that since the employment would not be created in a regional center, the petitioner could not rely on indirect employment and the limited partnership in that case had no plan to hire direct employees. That issue is unrelated to the employment issue in this case. The discussion in *Matter of Izummi* regarding increases in net worth relates to whether or not the petitioner in that case established a new commercial enterprise, not whether he could rely on job maintenance instead of job creation.

We acknowledge that if a petitioner invests in a troubled business, she need not demonstrate that she will create ten new jobs.

8 C.F.R. § 204.6(j)(4) provides:

> (ii) *Troubled Business*. To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

8 C.F.R. § 204.6(e) states that:

> *Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

The petitioner in this case has not demonstrated either that she invested in a troubled business or that she has preserved jobs at the pre-investment level. First, it is insufficient to merely claim that the business was losing money and would have closed. The regulations provide a strict definition of troubled business, quoted above. The petitioner has not demonstrated that Houston Diho Market met this definition at the time of sale because she has not submitted balance sheets or tax returns, schedule L, reflecting its net worth twelve or twenty four months prior to the petitioner's investment. Thus, we cannot determine whether it suffered a net loss and, if it did, whether that loss was equal to or greater than 20 percent of the company's net worth prior to the loss.

Moreover, the petitioner has still not demonstrated how many workers were employed by Houston Diho Market prior to the sale. Thus, she cannot demonstrate that she has maintained the employment at the pre-investment level. Nor can she demonstrate the creation of 10 new jobs. Further, despite being requested to submit Forms I-9 and being advised in the director's final decision that such forms were required, the petitioner has still not submitted the Forms I-9 for her current employees as required. Finally, without a comprehensive business plan, we cannot determine whether it is credible that the petitioner will create 10 jobs in two years. We note that the purchase of an operational poultry farm would also be the purchase of an existing business and will raise the same issue of whether the petitioner would create 10 new jobs not previously in existence at the farm.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.